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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MEHRAN HADIPOUR, Petitioner and Respondent, v. FAYE FARHANGI, Respondent and Appellant.	B287036 (Los Angeles County Super. Ct. No. BD602704)

APPEAL from an order of the Superior Court of Los Angeles County. Shelley L. Kaufman, Judge. Affirmed.

Law Offices of Gary Fishbein and Gary Fishbein for Petitioner and Respondent.

Keiter Appellate Law and Mitchell Keiter for Respondent and Appellant.

* * * * * *

Two now-former spouses entered into a marital settlement agreement that awarded the wife the family home in Rancho Palos Verdes. Prior to the settlement, wife had repeatedly voiced her concern that the home had "structural problem[s]," had hired a structural engineer to evaluate those problems, and had insisted that those problems diminished the home's value. Wife nevertheless settled. Many months after wife's engineer reported to her that the structural damage was extensive, wife moved to set aside the marital settlement due to fraud, mistake and breach of fiduciary duty. The trial court denied that motion as well as wife's last-minute motion to continue. We conclude that the trial court did not abuse its discretion in denying either motion, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Faye Farhangi (wife) and Mehran Hadipour (husband) got married in July 1990. Husband was a businessman; wife, a dentist. They did not have any children.

In 2007, husband and wife bought a two-story, four-bedroom home on Ganado Drive in Rancho Palos Verdes (the home).

In 2008, husband hired his cousin to do an extensive remodel, including partially removing one of the interior walls, widening a window on one of the exterior walls, and building a second-floor deck. Wife knew that the cousin did not have a contractor's license and that he had not obtained building permits for the work. Over the next six years husband and wife lived in the house and experienced no problems arising from the remodel.

In May 2014, husband and wife separated and husband moved out of the home.

II. Procedural Background

A. *Marital dissolution lawsuit*

In May 2014, husband filed for dissolution.

One of the major contested issues was the value of the home.

Husband hired a third-party appraiser to evaluate the home in September 2016. The appraiser reported that the "improvements [were] of average to good quality construction and in average condition." He appraised the house at $1.425 million. A few months later, husband testified at his deposition that he was not "aware" of any "structural [damage]" and that wife was "incorrect" in saying that the home had "structural issues."

Wife constantly maintained that the home had structural damage. During her deposition in April 2016, wife testified that the home had a "structural problem" because "the roof" and "the whole side of the building" were "coming downward"; she testified that she "need[ed] an engineer to come check that." She also testified to an "electrical problem" and "sewer smells." In September 2016, she told the appraiser husband hired that the "roof over [the] living room is sinking" and that the house has "sewer problems (smells), electrical problems (dining room light), [and] appliance problems (range-top burned-out)." In a January 2017 filing, wife reported that the value of the home was "unknown." In April 2017, wife hired Art Hoffstrom (Hoffstrom) to do a second, third-party appraisal of the home. Hoffstrom hired a structural engineering firm to examine the home, and the firm conducted its inspection on May 1, 2017. In her May 9, 2017 final status brief, wife asserted that the home had "substantial

structural problems" and was worth "substantially less" than $1.425 million, "closer to $1,000,000."

B. *Settlement of marital dissolution and entry of judgment*

On May 11, 2017, husband and wife met for an eight-hour settlement conference with a settlement judge. Both were represented by counsel.

They reached a "full" and "final" settlement, which they recited onto the record: Husband promised to pay monthly spousal support of $3,000 for one year, and $2,000 thereafter. Wife was to get title to the home and three cars, while husband was to get title to one jointly held property, two separately held properties, one car and a boat. Each spouse was to keep his or her own retirement plan assets and they were to share husband's IBM retirement annuity. Husband was to pay wife a $20,000 equalization payment.

After reciting these terms, wife stated under oath and on the record that she understood the terms of the agreement and was willing to accept them, no one forced her to enter into the agreement, and she had sufficient time to confer with her attorney about the terms of the agreement.

The parties agreed to draft and submit a final judgment setting forth these terms.

Four days after the settlement conference, on May 15, 2017, the structural engineering firm wife had hired delivered to her a written report. The report stated that the removal of the home's interior wall and exterior window had "significantly weakened" the structure of the home and that the second-floor deck had not been properly constructed.

In July 2017, wife's attorney communicated with husband's attorney regarding the proposed final judgment; he said nothing

about the value of the home. Husband filed a proposed judgment with the court in August 2017.

In September 2017, Hoffstrom wrote a letter expressing his opinion that the structural damage outlined in the engineering firm's May 2017 report would cost approximately $569,350 to remedy plus another $80,500 in "other project related costs."

On September 25, 2017, the trial court entered the proposed judgment.

C. *Motion to set aside*

On September 19, 2017, wife moved to set aside the judgment. Invoking Family Code section 2122,[1] wife argued that the settlement was the product of fraud, breach of fiduciary duty, mistake and perjury because husband had "repeatedly assured" her that "there were no structural issues with the house." In her motion, wife set the hearing date for November 1, 2017.

1. *Motions to continue*

Four days before the hearing date, wife made an ex parte request to continue the hearing for at least 10 weeks on the grounds that (1) Hoffstrom was unable to be present at the hearing because he was undergoing chemotherapy, and (2) she had not yet deposed husband's cousin. The trial court denied the ex parte request.

At the hearing itself, wife renewed her request to continue. After observing that wife was "in control of the motion['s hearing] date" and that there was no need for live testimony because the uncontroverted evidence showed that wife always believed the home needed repairs, and she simply chose to settle without first

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1 All further statutory references are to the Family Code unless otherwise indicated.

obtaining her own appraisal, the court found insufficient cause to continue and once again denied wife's request.

2. *Merits*

The court denied wife's motion to set aside the judgment. Factually, the court found wife "had an understanding or belief" regarding structural defects with the home "and did nothing with it," choosing instead to settle the case notwithstanding her misgivings. Legally, the court ruled that wife had not established any legal basis for setting aside the judgment. Husband did not commit "actual fraud" because there was "no credible evidence that [husband] knew of any structural damage" to the home and, more to the point, "no evidence that [husband] knew any more than [wife] knew." If anything, the court observed, wife "seemed to know more than [husband] did" about the structural issues with the home. Husband did not breach any fiduciary duty because there was "no evidence that [he] was in a superior position" to obtain knowledge about structural defects with the home. Both spouses had "the ability to get an appraisal" and wife had hired an appraiser, but she "decided to settle the case nonetheless" without waiting for the results of his analysis. There was also no mistake because wife maintained all along that the home had structural damage but "just didn't know the number [that is, the amount by which the structural damage affected the home's value]." "That was her choice," the court noted, "not . . . know[ing] the number before she went into settlement." Husband did not commit perjury because he disclosed the home as an asset and because "[t]he only evidence in the record is that he did not understand there to be structural damage."

D. *Appeal*

Wife filed this timely appeal.

DISCUSSION

Wife argues that the trial court erred in (1) denying her motion to set aside the judgment based on the marital settlement, and (2) denying her motion to continue the hearing on her motion. We review both claims for an abuse of discretion. (*In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 138 (*Varner*), superseded on other grounds, § 2122 [motion to set aside]; *Freeman v. Sullivant* (2011) 192 Cal.App.4th 523, 527 [continuance].) Under this standard, "[t]he trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712.)

I. Motion to Set Aside Judgment Based on Marital Settlement

Unlike most civil judgments that may be set aside only within six months of entry and on the grounds specified in Code of Civil Procedure section 473, marital dissolution judgments may be set aside under section 2122 for a longer period of time and on a broader array of grounds. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1143-1146 (*Rubenstein*) [section 2122 and related provisions "creat[ed] an exception to res judicata"].) As pertinent to this case, section 2122 empowers a court to set aside a marital dissolution judgment if the moving party proves (1) either "actual fraud" or a "mistake of law or mistake of fact"

(§ 2122, subds. (a), (e)),[2] and (2) the actual fraud or mistake "affected the original outcome" and "the moving party would materially benefit from the granting of relief" (§ 2121, subd. (b)). (*In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 89-90 (*Kieturakis*) [moving party has burden of proof].)

A. *Actual fraud*

As pertinent here, section 2122 defines "actual fraud" as "ke[eping]" the moving party "in ignorance." (§ 2122, subd. (a).)[3] This can occur when the other spouse (1) affirmatively misrepresents facts or (2) breaches his fiduciary duty to disclose material information bearing on the dissolution (because that duty lasts until distribution is completed). (*Rubenstein*, *supra*, 81 Cal.App.4th at pp. 1150-1151; *Varner*, *supra*, 55 Cal.App.4th at p. 142; see generally § 721, subd. (b) ["'in transactions between themselves, [spouses] are subject to the general rules governing fiduciary relationships'"].) As with all fraud, the non-moving spouse must actually and justifiably rely on the misrepresentation or omission. (*Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 294.)

The trial court did not abuse its discretion in ruling that wife did not prove "actual fraud" within the meaning of section 2122 for three reasons.

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2 A dissolution judgment may also be set aside due to "perjury" (*id.*, subd. (b)), but wife does not appeal the trial court's denial of relief on this ground. Accordingly, we will not discuss it further.

3 It also reaches "fraudulently prevent[ing]" the moving party "from fully participating in the proceeding" (*ibid.*), but wife makes no allegations along these lines.

First, wife never established that husband made any affirmative misrepresentation about the structural soundness of the home. Although, as wife points out, husband testified during his deposition that wife was "incorrect" to believe the house had "structural issues" because he was unaware of any, this testimony does not constitute an affirmative misrepresentation unless husband *knew* there were structural issues. However, wife offered no evidence he did. Wife argues that husband's cousin might have testified that husband knew the home had structural issues, but this argument is based on nothing but speculation.

Second, wife never established that husband breached his fiduciary duty to disclose structural issues about the home. A spouse does not breach his fiduciary duty of disclosure if he discloses all he knows about a marital asset and the other spouse "choose[s] to accept his assertion" and not to "investigate the facts" further. (*Boeseke v. Boeseke* (1974) 10 Cal.3d 844, 849-850 (*Boeseke*); *In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 741 (*Burkle*).) Here, substantial evidence supports the trial court's findings that wife knew that the home had structural issues and that wife knew that the contractor did not have a license or proper building permits; indeed, that is why wife hired her own appraiser and structural engineering firm to evaluate the home.

Third, wife never established that she relied on husband's misstatements or omissions. Wife asserts that she relied on husband's pre-settlement disavowal of any knowledge of structural problems with the home, but this assertion is undermined by wife's hiring of her own appraiser and structural engineering firm. Wife asserts that she was pressured to accept

husband's representations regarding the home during the settlement conference, but this assertion is undermined by wife's sworn statement to the trial court that no one forced her to agree to the settlement. The trial court was well within its discretion to give more weight to wife's contemporaneous conduct and statements than to the contrary statements she made in support of her motion to set aside. (See *Lee v. United States* (2017) 137 S.Ct. 1958, 1967 [noting propriety of giving "contemporaneous evidence" of a party's intent greater weight than the party's more self-interested "post hoc assertions"]; accord, *Kieturakis*, *supra*, 138 Cal.App.4th at p. 90 [giving weight to party's contemporaneous statements to mediator].)

B. *Mistake*

Under section 2122, a "mistake" may occur when one or both spouse(s) makes a "mistake of law or mistake of fact." (§ 2122, subd. (e) ["mistake" may be "mutual or unilateral"].) Because, as noted above, spouses owe each other a fiduciary duty, a spouse may make a "mistake of fact" warranting relief from a marital judgment when (1) she is unaware of the true facts, (2) the other spouse was in a "superior position to gain access" to those facts, and (3) the other spouse had a fiduciary duty to disclose those facts. (*In re Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334, 1348 (*Brewer*).)

The trial court did not abuse its discretion in ruling that wife did not enter into the settlement agreement based on any mistake of fact. That is because wife *was* aware of potential structural issues with the home, wife was in a superior position to gain access to those facts because she was in sole possession of the home for nearly three years prior to settlement, and because husband's fiduciary duty did not obligate him to conduct an

investigation over and above what he already did in hiring the first appraiser and then giving wife that appraiser's report. Rather than wait for the investigation she had commissioned to be finished, wife elected to settle. This was a "tactical decision" (*In re Marriage of Connolly* (1979) 23 Cal.3d 590, 600), and "[d]esign[ed] conduct is not mistake . . . ." (*Pagarigan v. Aetna U.S. Healthcare of California, Inc.* (2007) 158 Cal.App.4th 38, 45; *Boeseke*, *supra*, 10 Cal.3d at p. 850 [where "a spouse, represented by independent counsel, determines to forego a suggested investigation and to accept a proposed settlement, that spouse may not later avoid the agreement unless there has been a misrepresentation or concealment of material facts"].)

C. *Wife's arguments*

Wife offers what boil down to three arguments against these conclusions.

First, she contends that the existence of husband's breach of fiduciary duty excused her as a matter of law from any and all duty to investigate for herself the structural integrity of the home. She is wrong, as a party "ha[s] a duty to investigate even where a fiduciary . . . [duty] exists when '[s]he has notice of facts sufficient to arouse the suspicions of a reasonable [wo]man.'" (*Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 855; *Ferguson v. Yaspan* (2014) 233 Cal.App.4th 676, 683 [party may not """sit idly by"""]; *Burkle*, *supra*, 139 Cal.App.4th at p. 741 [spouse is excused from duty to investigate only if "actual concealment or misrepresentation"].) Here, wife harbored such suspicions.

Second, wife asserts that she is entitled to relief under *Brewer* because she was unaware of the true value of the home (once adjusted for its structural defects) and because husband

was in a superior position to know the true value because (1) husband had "superior access" to his cousin, the remodeler, and (2) wife could not afford an appraiser of her own. We reject these assertions. Husband's alleged "superior access" to his cousin is irrelevant, as wife already knew cousin's work was unlicensed and unpermitted. Further, it is difficult to see what the cousin could say about the structural integrity of the home in 2017 when the remodel ended nearly a decade earlier, in 2008. And wife's plea of poverty ignores that she did in fact hire—and, by implication, thus was able to afford—an appraiser and structural engineering firm, and ignores that her annual wages in 2014 were just shy of $100,000. *Brewer* is inapt: There, the court held that a spouse was entitled to set aside a marital judgment due to his mistake regarding the value of his wife's retirement benefits, which the wife had reported as having an "unknown" value despite her ability to ascertain the actual value. (*Brewer*, *supra*, 93 Cal.App.4th at pp. 1343-1348.) Here, by contrast, wife had an equal if not better ability than husband to assess the structural integrity of the home, voiced suspicions that a panoply of problems reduced the home's value, and chose to settle rather than complete her investigation of those problems. Wife's mis-valuation stemmed from her own lack of investigation, not any misrepresentation, concealment or nondisclosure by husband. (*In re Marriage of Carter* (1971) 19 Cal.App.3d 479, 491 ["investigation could have revealed the fair market value of the husband's corporations," the existence of which was not concealed].)

Third, wife alleges that the mediator told her she could "always file to set the agreement aside" "if it turned out that the home was structurally defective." This evidence is privileged

(Evid. Code, §§ 1115 et seq.), and in any event contradicts wife's contemporaneous representations that the settlement was voluntary, "full" and "final."

II. Motion to Continue Hearing

A trial court has the power to continue a hearing upon a showing of "good cause." (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 823.)

The trial court did not abuse its discretion in concluding that wife had not demonstrated "good cause" to continue the hearing. Wife said she needed a continuance so that Hoffstrom and the cousin could testify at the hearing. However, their unavailability stemmed from wife's decision to set the hearing for her motion just 43 days after filing it and then not subpoenaing either witness for that date. Because a party does not demonstrate "good cause" when her own actions have created the need for a continuance (e.g., *People v. Grant* (1988) 45 Cal.3d 829, 844), the trial court did not abuse its discretion in rejecting a continuance.

Wife offers three arguments as to why she was entitled to a continuance.

First, she argues that section 217 so entitles her. Section 217 provides that a family court "shall receive any live, competent testimony that is relevant and within the scope of the hearing." (§ 217, subd. (a).) Section 217 does not aid wife because she has not satisfied its prerequisites. Both she and husband were sworn in, but she did not call herself or husband as witnesses. And the testimony of the two third-party witnesses—Hoffstrom and the cousin—was not "relevant." As explained above, relief under section 2122 turns on whether husband committed "actual fraud" or whether wife labored under a

"mistake"; these hinge on what husband and wife *subjectively knew*. Nothing Hoffstrom or the cousin might say could bear on the spouses' subjective knowledge, as wife's counsel seemed to acknowledge regarding Hoffstrom. Wife asserts that the cousin might be able to say what husband knew about the home's structural defects, but as noted, this assertion is based on nothing but speculation. Wife also did not file her witness list concurrently with her motion; this is required by the California Rules of Court, which are the product of a legislative delegation. (Cal. Rules of Court, rule 5.113(e) [so requiring]; see generally § 211 [delegating to Judicial Council the power to "provide by rule for the practice and procedure"].) Wife also did not introduce evidence that she subpoenaed either witness for the hearing; thus, the trial court's denial of a continuance was not a refusal to allow for otherwise extant live testimony. (*In re Marriage of Binette* (2018) 24 Cal.App.5th 1119, 1126-1127 [§ 217's provisions may be "forfeited"]; cf. *In re Swain* (2018) 21 Cal.App.5th 830, 837-841 [§ 217 violated when court requires otherwise prepared witness to submit declaration without being subject to cross-examination].) At bottom, wife seems to suggest that section 217 grants her the absolute right to a continuance. It does not.

Second, wife contends that section 218 mandates a continuance. That section provides for the "automatic[] reopen[ing]" of discovery as to any postjudgment motions in family law cases upon the filing of such a motion. (§ 218.) That wife may have had the right to seek discovery for the 13 days between filing her motion to set aside and the date on which that discovery would close (see § 218; Code Civ. Proc., § 2024.020) has nothing to do with whether she had good cause to continue the hearing.

Lastly, wife argues that a continuance would not prejudice husband. Prejudice only matters if the movant first establishes good cause, and wife has not met this initial burden.

In light of our analysis, we have no occasion to reach the alternate ground for affirmance offered by husband.

DISPOSITION

The order denying the motion to set aside and request for a continuance is affirmed. Husband is entitled to his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P.J.
LUI

_____, J.
ASHMANN-GERST